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and not the effect of the act upon the other party is the test for a criminal assault.

Applying this test to the case in hand it is clear that the defendant is not guilty of a criminal assault in shooting in the direction of the witness, within carrying distance of the pistol, not intending to hit him but only to scare him; unless it be held that the intent necessary need not be to do corporal injury but may be merely to frighten him. While the definitions practically all hold that the intent must be to do corporal injury to another, yet there are a few cases that hold that an intent to frighten or scare is sufficient.<sup>6</sup>

In the *State v. Tripplett*,<sup>6</sup> the Court said, "when the attitude or action of a party is threatening toward another, and the effect is to terrify, the offense of assault is complete." In *State v. Baker*,<sup>6</sup> the Court held in respect to an instruction similar to the one under review that, "firing a pistol in the direction of another with the intention of frightening him, or with the intention of wounding him, are equally assaults. There must be an intent to commit an assault, or else there can be no assault. Committing an assault need not be wounding. It may consist in frightening as well." Thus again we see that the difference of view rests upon the difference in the definition followed.

While the last line of cases is in direct accord with the instruction given by the lower court in the case under consideration, yet the instruction can hardly be reconciled with the cases that hold that there must be an actual intent and ability to commit a battery, and which seem to be more in accord with the fundamental conceptions of the criminal law. That shooting a gun in the direction of another within range and intending to scare him is a civil assault if it does frighten or that it may result in a breach of the peace and amount to a misdemeanor, is agreed. But such should not be held sufficient to sustain an action for criminal assault.

The cases in accord and contrary to the necessity of a present actual intent are collected in 4 Cent. Dig., Sec. 69; and in 3 Cyc. of Law & Pro., page 1020.

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#### THE EXTENT OF PROPERTY RIGHT IN A TRADE MARK.

The facts in the case of *Correro v. Wright*, 47 Southern Reporter 379 (decided in the Supreme Court of Mississippi)

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<sup>6</sup> *State v. Tripplett*, 52 Kansas 678; *State v. Baker*, 20 R. I. 275.

were these: A was a manufacturer of bottled drinks, using bottles in which were blown his name, together with the words, "This bottle never sold." He claimed to retain title in the bottles and required dealers to return them to him. B obtained some of these bottles, and was putting up a drink somewhat similar to that made by A, and was selling it on the market, thus injuring A's business. A brought a bill in equity alleging that he had a property right in the bottle and in his trade mark, and asking that the acts of B be enjoined. B demurred, setting up among other objections, that A was not entitled to the exclusive use of the bottles unless he had a patent right on them, properly registered, and further that the relief prayed for was in restraint of trade, since it sought to prevent competition. The Court overruled the demurrer, holding that there is a common law property right in a trade mark, and if used or imitated by others, restraint by injunction could be had. The Court went on to say that the bill showed that the bottles were the complainant's property, and that the demurrer admitted that to be the fact.

There is no doubt that the complainant was entitled to an injunction, as the acts of the defendant were clearly wrongful, and intended to deceive the public.<sup>1</sup> The case, however, suggests several queries as to what the Court might have held had a different state of facts been presented for judicial action. The bottles contained the words, "This bottle never sold." Did these words mean that the complainant never sold the bottles, but retained title in himself, merely leasing them to the retailer, to be in turn leased to the consumer, or did they mean that the transaction between the manufacturer and the retailer was one of sale, with a covenant on the part of the retailer not to sell the bottles? The fact that complainant required his dealers to return them would indicate that he leased the bottles, but although the facts do not so show, the transaction may have been one of sale, the manufacturer charging a price sufficient to compensate himself for the bottles and their contents, and trusting to have some of them at least returned. Looking at the transaction as a lease, the defendant, even though he may have taken as a *bona fide* purchaser from the retailer, would have been put on notice of the defective title by the words in question, and would have had no right to sell the bottles, either filled or emptied. But regarding the transaction as one of sale, with a covenant on the part of the retailer not to sell the bottles, the matter takes on a different aspect. The question then would

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<sup>1</sup> *Rose v. Loftus*, 38 L. J. Rep. (N. S.) 409.

be whether such a covenant would bind anyone into whose hands the bottles might come, it being admitted that the retailer would be bound by its terms.

It has been held that a covenant in regard to land, made for the benefit of other lands of the grantor, will bind the assigns of the grantee.<sup>2</sup> It would seem, however, that in considering the question of whether or not covenants run with personal property, the courts have not used reasoning analogous to that on which they proceeded with regard to covenants for lands, but have held that either the covenant did run or that it did not, irrespective of whether or not it was a benefit to other property of the grantor. In a leading case decided in New York in 1895,<sup>3</sup> it was held that such a covenant did run, the Court saying that "the party purchasing under such circumstances takes the property burdened with the contracts made by its owner in reference thereto and which he had the power to make." The weight of authority, however, seems to be *contra* to this case, and to follow what is, perhaps, the leading case<sup>4</sup> on the subject, wherein it was early laid down that a covenant could not run with personalty. In a comparatively recent case,<sup>5</sup> decided in the Superior Court of Pennsylvania in 1902, the Court said that "a manufacturer may control by contract the trade sales of proprietary articles to his direct purchasers, but he cannot retain the title to his property, and impose unreasonable restrictions on its transfer after he has received the price he designates as the full purchase price therefor." Looking at the case of *Correro v. Wright* (*supra*) as one of out-and-out sale, and applying the reasoning of the Pennsylvania case just mentioned, it would follow that the defendant, not having contracted with the plaintiff with regard to the bottles, would not be bound by the words placed thereon by the complainant.

This leads to a consideration of the ground on which the Court mainly rested its decision, namely, that the defendant's acts constituted an infringement of the plaintiff's rights in his trade-mark. The defendant's acts were clearly restrainable, but under a different state of facts, the Court's statement that there is a common-law property right in a trade mark, use or imitation of which will be restrained by injunction, might be

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<sup>2</sup> *Peck v. Conway*, 119 Mass. 546.

<sup>3</sup> *New York Bank Note Co. v. Hamilton Bank Note Co.*, 83 Hun. (N. Y.) 593.

<sup>4</sup> *Spencer's Case*, 5 Coke, 16.

<sup>5</sup> *Garst v. Wissler*, 21 Super. 532.

difficult to apply. What is the nature of that property right, and to what extent does it protect the owner? In an English case presenting facts similar to those of *Correro v. Wright*, the Court said that an injunction would lie although the defendant put a label of his own on the bottles marked with plaintiff's design.<sup>6</sup> This would seem to indicate that plaintiff's right in his trade-mark was not such a right as extended merely to preventing another's product being sold as his, but was an absolute right. To the contrary are the dicta contained in a later case decided in the United States Circuit Court.<sup>7</sup> It was there said that while "the defendant may bring into the market these bottles, and sell them again filled with anything but lime juice, he should not be permitted to put his own lime juice into a bottle stamped with complainant's name and sell it." It would seem that the above dicta would be the sounder doctrine and more consonant with the real object of a trade-mark, to wit, the protection given a manufacturer or dealer as indicating the origin and ownership of his goods, and preventing another from palming off on the public similar goods by representing them to be the goods of the manufacturer or dealer in question. Besides this, the application of a doctrine which would confine actions for infringement of a trade-mark to cases where it has been appropriated and used to indicate origin and ownership of goods, would be but carrying out the policy of the common law, which has always been opposed to monopolies, and would clearly indicate that the courts would not permit the protection of a trade-mark to be carried to the extent of interfering with legitimate competition.

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<sup>6</sup> *Rose v. Loftus*, 38 L. T. Rep. (N. S.) 409.

<sup>7</sup> *Evans v. Von Laer*, 32 Fed. Rep. 153.